U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
USCIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536

File: WAC 01 087 51008 Office: California Service Center Date: FEB 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant appears to be represented; however, the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative. All representations will be considered, but the decision will be furnished only to the applicant.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158

(Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on January 14, 1998. The proffered salary as stated on the labor certification is $11.55 per hour which equals $24,024 annually.

With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage. Therefore, on January 30, 2001, the California Service Center sent the petitioner a Request for Evidence. The petitioner was requested to provide evidence pertinent to the ability to pay beginning on January 14, 1998. The petitioner was specifically instructed to submit its tax returns.

In response, the petitioner submitted a press release announcing its recent financial accomplishments. An unaudited balance sheet accompanied that press release.

A cover letter submitted with that evidence states,

> Ability to pay. In regards (sic) to the financial records please note this corporation is very large and holds its finances very private and prevailiaged. (sic) Enclosed, we are sending a finical (sic) records and you can verify this information on the web at www.champps.com.

The petitioner did not submit its tax returns, nor did it submit any of the other types of evidence specified in 8 C.F.R. § 204.5(g)(2).

On October 11, 2001, the California Service Center sent the petitioner another request for evidence. The Service Center reiterated its request that the petitioner submit evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In accordance with the requirements of 8 C.F.R. § 204.5(g)(2), the Service Center specified that the evidence submitted should be either copies of annual reports, federal tax returns, or audited financial statements.

The petitioner responded by providing a copy of a "Stock Report," giving information pertinent to the performance of the petitioner's stock and the petitioner's financial condition. That document is not an annual report (SEC Form 10-K), nor a federal tax return, nor an audited financial statement.

On January 18, 2002, the California Service Center sent the petitioner yet another Request for Evidence. Once again, the Service Center requested that the petitioner demonstrate its

continuing ability to pay the proffered wage beginning on the priority date of the petition. Once more, the Service Center specified that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. In addition, the Service Center requested that the petitioner submit copies of its payroll summary, its Federal W-2 forms, and its Federal W-3 forms.

In response, the petitioner submitted a copy of a 2000 Form W-2 wage and tax statement showing wages it ostensibly paid to the beneficiary during that year. The petitioner also submitted copies of two different W-2 forms showing two different amounts it allegedly paid to the beneficiary during 2001.

The petitioner submitted no annual reports, no tax returns, and no audited financial statements. The petitioner did not submit the requested payroll summary, the requested W-3 forms, or any other W-2 forms. Further still, the petitioner did not explain the discrepancy between the contradictory 2001 W-2 forms which show two different amounts which the petitioner ostensibly paid to the beneficiary during 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner submits a letter stating that it previously submitted its tax returns. With the appeal, the petitioner submitted the first page of its Form 1120 corporate tax returns for 1998, 1999, and 2000. Those returns cover the fiscal years ending July 1, 1999, July 1, 2000, and July 1, 2001, respectively.

The 1998 tax return shows that the petitioner suffered a loss of $40,965,337 during that year and paid no compensation to its officers. However, the petitioner still paid $43,719,157 in salaries and wages.

The 1999 tax return shows that the petitioner suffered a loss of $3,672,087 and paid no compensation to officers, but paid salaries and wages of $33,992,782.

The 2000 tax return shows that the petitioner's taxable income before net operating loss deduction and special deductions was $2,256,312 and that it paid no compensation to officers, but paid salaries and wages of $41,410,762.

The petitioner's submissions remain imperfect. The petitioner

submitted only one page of its tax returns, rather than the full four pages with the various schedules and attachments. The petitioner did not submit its fiscal year 1997 tax return, although that return would contain information pertinent to the period from the priority date until July 1, 1998. The petitioner never submitted the requested payroll summary or W-3 forms. Further, the petitioner has not explained why it submitted two contradictory 2001 W-2 forms for the beneficiary.

However, none of those omissions is sufficient, in the instant case, to convince this office that the information on the single page of each tax return is fraudulent. Those returns show that the petitioner, although it sustained losses, maintained a payroll of more than $33,000,000 during each of the three years for which those partial returns were submitted. On the balance, the petitioner has submitted sufficient evidence that it has had the ability, since the priority date, to pay the proffered wage of $24,204.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.